FOR ARGUMENT

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-5420

THEODORE PAYTON,

Appellant,

vs.

NEW YORK,

Appellee.

No. 78-5421

OBIE RIDDICK,

Appellant,

vs.

NEW YORK,

Appellee.

Appeals from the New York Court of Appeals

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

I

Appellee presents no valid reason for exempting entries of the home to arrest from the warrant requirement.

Appellee presents a number of arguments designed to show that the warrant requirement would severely interfere with law enforcement or would otherwise be useless or counterproductive. Because most of these arguments are based on certain fallacies, they are insubstantial. Moreover, those arguments which are not fallacious actually favor the imposition of the warrant requirement. Thus, appellee's arguments do not refute the position stated in our main brief.

The premise underlying each of appellee's arguments that the warrant requirement will "severely interfere" with law enforcement is that the requirement will "lead police officers to get the warrant as soon as possible" (Br. at 51, 55). This premise is false. It is based on the notion that if the officer waits, rather than getting a warrant immediately, and then some exigency requires him to make an immediate, warrantless arrest, his actions will be found unlawful (Br. at 55). The error in this assumption is evident enough, however, for the very exigency that requires the immediate arrest excuses the failure to get a warrant. Where, for example, officers delay making an arrest pending a more thorough investigation and then learn that their suspect has plans to flee the jurisdiction imminently, they may certainly arrest without a warrant. The police can

hardly be expected to allow the suspect to escape, and an immediate warrantless arrest is entirely reasonable under the Fourth Amendment, notwithstanding any prior police decision to delay the arrest. See, e.g., *People* v. *Vaccaro*, 39 N.Y.2d 468, 348 N.E.2d 886 (1976); *Commonwealth* v. *Boswell*, —— Mass. ——, 372 N.E.2d 237, 241 (1978). Thus, the police need not obtain an arrest warrant at the earliest possible moment, for if they do not and a sudden emergency arises, they are entitled to arrest without a warrant, even in a home.

Because the remainder of appellee's arguments depend on the premise that the police must "rush to the courthouse" (Br. at 61) to get arrest warrants, those arguments also fail. Appellee argues, for example, that because of the rush to get the warrant, various intolerable consequences will result: police will seek warrants before they have probable cause, magistrates will erroneously approve them,[1] and innocent people will be arrested or evidence suppressed (Br. at 55-56); the magistrate will, because of the early stage at which the warrant is obtained, become the

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1. Like a number of other arguments advanced by appellee, this one depends on the additional premise that public officials will fail to do their duty if a warrant requirement is imposed. Elsewhere, for example, appellee assumes that courts will fail to find exigency when circumstances required an immediate arrest (Br. at 55) or that magistrates will not give serious consideration to arrest warrant applications which they will "rubber-stamp" (Br. at 75-76). Our position, however, is that magistrates do their duty conscientiously in most cases, that they will give warrant applications whatever scrutiny they deserve, and that they will not suppress evidence where the police reasonably believed emergency action was necessary. We believe the Court's insistence upon the warrant except in certain carefully defined cases is founded on this very premise. See, *Camara* v. *Municipal Court*, 387 U.S. 523, 528-529 (1967).

"supervisor of the investigation" (Br. at 56, 57);[2] the police will never know whether to pursue their investigation or to get a warrant (Br. at 58); and the police will make "unplanned and ill-considered" arrests in homes (Br. at 61). As we have shown, however, the police need not rush to get the warrant. Accordingly, they may prolong their investigation to ensure that they have probable cause, need not go immediately to a magistrate after they have it, and may, as appellee advocates, "take as much time as is reasonably necessary to plan arrests" (Br. at 61). The warrant requirement will not force them to make hasty arrests or to subject themselves to danger in the absence of thorough planning. Thus, the awful consequences of police haste envisioned by appellee are little more than phantoms conjured up to avoid the warrant requirement of the Fourth Amendment.

Indeed, appellee's emphasis on the need to plan the entry of homes supports the view that warrants may safely be required for such entries. Appellee repeatedly asserts that before making such entries, the police must take time to assure that they have had dinner and ample sleep (Br. at 62-63), to complete their investigation (Br. at 61), to plan the arrest (Br. at 61), and generally to assure their

2. This particular argument is preposterous on other grounds. It supposes that the police are under some obligation, once they have a warrant to arrest, to inform the magistrate of every further step in their investigation. This is simply not the case. Indeed, appellee cites no authority to support its position. Nor does it appear that any such problem has arisen in those jurisdictions where warrants have long been required for home arrests. And in those places where police departments have voluntarily sought such warrants, the police have apparently not felt hindered by any "supervision" of the magistrate. See W. Lafave, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 45-46 (1965).

own safety (Br. at 61, 63).[3] Since public safety is not jeopardized by this extensive and time consuming preparation, there is no basis for concluding that the time required to get a warrant would create peril.[4]

A number of appellee's other arguments not only fail to support its position but instead support the view that warrants should be required for home arrests.[5] Appellee argues, for example, that if a warrant is obtained, the range of issues defendants can raise at suppression hearings will be curtailed (Br. at 74-75). This argument hardly helps appellee, however, for it demonstrates that the warrant requirement is desirable since it actually tends to reduce litigation and may well result in a decrease in the amount of evidence actually suppressed. Thus, in this context, there

3. Here appellee contradicts its earlier arguments that the interest at stake is the "need to catch armed criminals . . . as quickly as possible" (Br. at 51). Clearly appellee recognizes that this "need" is often qualified and that arrests may frequently be postponed with no danger.

4. *United States* v. *Campbell*, 581 F.2d 22, 26-27 n.7 (2d Cir. 1978), in which an F.B.I. agent testified that it took four to five hours to obtain a warrant in the Southern District of New York, should not be taken as representative. The length of time will, of course, depend on the circumstances of individual cases. In some instances, it could take much less [*People* v. *Vaccaro*, 39 N.Y.2d 468, 472-473, 348 N.E.2d 886, 890 (1976) (two hours to obtain a search warrant in New York County)] and in others more.

5. The remainder of appellee's arguments designed to show that the arrest warrant serves no "protective function" (Br. at 72) are simply false. As appellee recognizes, police sometimes rely on "street talk," "hunches," and informers of questionable reliability in determining whether to act (Br. at 54). Without a warrant requirement, officers may be tempted to arrest in homes on such flimsy knowledge. But the officers may well be reluctant to face a magistrate with the same information as a basis for a warrant application. And if without further investigation, the officer does go to a magistrate, the magistrate's refusal to issue a warrant on less than probable cause constitutes the very protection of constitutional rights which the warrant requirement was meant to ensure.

need be no concern that the warrant requirement will cause extensive litigation. Compare, *United States* v. *Watson*, 423 U.S. 411, 423-24 (1976); see also *United States* v. *Peltier*, 422 U.S. 531, 542-543 n.13 (1975). Appellee also argues that "an arrest warrant requirement will strip those falsely arrested of their historic right to damages, because the mere existence of the arrest warrant . . . will ordinarily shield the officer from liability" (Br. at 72). Here, too, the result appellee laments is in fact desirable, for if police officers have acted conscientiously to obey the Fourth Amendment they should be protected, and additional litigation should not be encouraged. Rather than supporting appellee's position, therefore, both of these arguments provide further reason why warrants should be required for arrests in the home.[6]

In sum, appellee presents no valid reasons for exempting entries of the home to arrest from the warrant requirement.

6. Appellee's argument that the warrant's command that a person be brought to court prevents the police from releasing innocent people is also erroneous (Br. at 73-74). It is true that an arrest warrant in New York, like a search warrant, constitutes a form of "process" commanding the officer to do an act. N.Y. Crim. Proc. Law §§120.10(1), 690.05(2). However, it does not follow that the officer must always execute that process regardless of intervening circumstances. For example, if an officer in New York is ordered by a search warrant to search certain premises and then learns that the wrong premises are named in the warrant, he is not required to search an innocent person's home because of the warrant's command. Similarly, if after obtaining an arrest warrant, the officer acquires information that convinces him the person named in the warrant is the wrong person, he need not make that arrest. There is no obstacle to his returning to court and informing the magistrate that the new information he has obtained vitiates the probable cause upon which the warrant was issued. Cf. *Restivo* v. *Degnan*, 191 Misc. 642, 646, 77 N.Y.S.2d 563, 567 (Sup. Ct. 1948) (magistrate can recall and cancel warrants of arrest issued by mistake).

II

Appellee's argument that appellant Payton is not entitled to suppression of evidence obtained pursuant to a statute directly violative of the Fourth Amendment is without merit.

As an independent basis for affirmance in *Payton*, appellee argues that even if the statute is held unconstitutional, appellant Payton should be denied all relief (Br. at 81-92). The same result is not sought in *Riddick* because appellee deems constitutionally significant the fact that the entry in *Riddick* occurred after *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) which "clearly raised the issue . . ." (Br. at 86).[7] To achieve this, appellee proposes a four-pronged test which, if accepted, would require the Court to overrule *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967) and to depart from long adhered-to principles of constitutional adjudication which afford the prevailing litigant the relief which turns upon the result achieved. Because these principles are sound and the test proposed by appellee unfounded and untenable, appellee's argument is without merit.

In *Stovall*, the Court held that Wade and Gilbert were entitled to the benefit of the rules established in their cases because that benefit is

> an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum.

7. Because appellee expressly recognizes the important functions of the exclusionary rule and the serious difficulties that restriction of the rule to bad faith situations would cause (Br. at 82-84, 88-89) and does not challenge the application of the rule in *Riddick*, we do not address possible expansion of appellee's proposed rule which might affect that case.

> Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law militate against denying Wade and Gilbert the benefit of today's decisions.

388 U.S. at 301. And, as the Court has recently reiterated, Article III remains the principal basis for applying new constitutional doctrines in cases that establish them for the first time. *Bowen* v. *United States*, 422 U.S. 916, 921 (1975).

No less important, as the *Stovall* Court perceived, is the deleterious effect that the likelihood of merely prospective rulings would have upon constitutional adjudication. 388 U.S. at 301. The spectre of a purely prospective ruling, particularly in criminal cases, would effectively preclude important constitutional issues from ever being raised.[8]

8. As Professor Mishkin has observed,

> if parties anticipate such a prospective limitation, they will have no stimulus to argue for change in the law. Indeed, the recognition of even a substantial possibility of such limitation will tend to deter counsel from advancing contentions involving novelty or ingenuity and will lead them to focus on other aspects of their cases. Under such circumstances, issues involving renovation of unsound or outmoded legal doctrines will either not be presented for judicial decision or—what may be even more troublesome—if reached by the courts, may be decided upon inadequate argument and consideration.

Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 61 (1965). Of course, the issue of a statute's constitutionality might be raised on an appeal which had been taken because there were other possible grounds for reversal. However, a constitutional determination in such a case would be *dictum*, and since it could not affect the disposition of the case, the court's reaching of the constitutional question would directly contravene this Court's repeated insistence that constitutional questions not be decided unnecessarily. *Bowen* v. *United States*, 422 U.S. 916, 920 (1975).

A non-indigent defendant would not retain an attorney and incur the costs of an appeal if the attorney advised that despite a clear violation of his Fourth Amendment rights, there was no possibility that his conviction could be reversed. A public defender or assigned attorney would, in a world of limited resources, more properly turn his attention to those individuals who could be aided in some concrete fashion.[9]

In pressing its wish to have the Court engage in such a drastic alteration of established principles of constitutional adjudication, appellee relies substantially on *United States* v. *Peltier*, 422 U.S. 531 (1977). That reliance is misplaced. In *Peltier*, the Court was concerned with whether the Fourth Amendment standard announced in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) was to be given *retroactive* application. Indeed, the Court clearly said: "where it has been determined, as in a case such as *Linkletter*, that an earlier holding such as *Mapp* is not

9. Moreover, appellee's assertion that Fourth Amendment principles can be developed in civil litigation (Br. at 90) simply ignores past history and present law. *Mapp* v. *Ohio*, 367 U.S. 643 (1961) was predicated on a finding that remedies other than suppression did not adequately protect Fourth Amendment rights. *Id.* at 651-652. But even if a damage remedy is available for certain Fourth Amendment violations as in *Bivens*, an officer who acts pursuant to the specific mandate of a state statute may have a perfectly valid good faith defense. See, e.g., *Bivens* v. *Six Unknown Named Agents*, 456 F.2d 1339, 1341 (2d Cir. 1972) ("it is a valid defense that the . . . officer acted in good faith and with a reasonable belief in the validity of the arrest and search . . ."). See, also, *Wood* v. *Strickland*, 420 U.S. 308, 313-322 (1975). Thus, adjudication of facially unconstitutional statutes in a civil damage suit is not a logical possibility. Indeed, the illogic of appellee's entire argument on this point is glaring; they urge that where officers act on the basis of a statute the suppression remedy should be removed since other civil remedies are available while wholly disregarding the fact that the officers' reliance on the same statute will remove all possibility of a civil recovery.

to be applied retroactively, it has not been questioned that Mapp was entitled to the benefit of the rule enunciated in her case. See *Stovall* v. *Denno*, 388 U.S. 293, at 300-301." 422 U.S. at 542 n.12.

Not only does the *Payton* case not raise any issue of retroactive application, the factors which led the Court to focus its analysis on the good faith of the Border Patrol officials in *Peltier* are entirely absent.[10] When the validity of a statute is before the Court for the first time and it is determined that the statute is violative of the Fourth Amendment, any inquiry into the good faith of the arresting officers or their superiors is beside the point. For when a legislature passes such a statute, it is obvious that the litigant who is first to challenge its validity has no quarrel with the police but with the legislature which authorized them to violate the Constitution. In such a setting the public interest served by the exclusionary rule is that of deterring legislators from enacting statutes which violate the Fourth Amendment. See, Note, 47 N.Y.U.L. Rev. 595, 602-604 (1972). In this respect, the position of a defendant who challenges a statute on Fourth Amendment grounds is the same as one who challenges the validity of a search warrant. In either case, the particular officer involved is acting in good faith on the basis of an authorization by another governmental officer or body; but where, as in the case of the invalid search warrant, the authorization itself violates the Fourth Amendment, the exclusionary rule plays an important role in deterring such authorizations from being made. See, e.g., *Spinelli* v. *United States*, 393 U.S. 410 (1969); *Aguilar* v. *Texas*, 378 U.S. 108 (1968).

10. The situation here is different from that in *Peltier* in one further respect. As the Court observed, the statute in question there had been "supported by longstanding administrative regulations and continuous judicial approval." 422 U.S. at 541. Indeed, the Court emphasized that the courts of appeals had for many years uniformly sustained the constitutionality of the statute facially and also as applied by Border Patrol officers in circumstances like those in *Peltier*. *Id.* at 540-541. Here, on the other hand, the New York courts had never even considered the question of the statute's constitutionality prior to the *Payton* and *Riddick* cases.

Thus, the Court has never refused to apply the exclusionary rule in situations where unconstitutional police conduct was expressly authorized by state statute. In *Coolidge* v. *New Hampshire*, for example, evidence obtained pursuant to a warrant issued by the state's attorney general, rather than by a "neutral and detached magistrate," was suppressed even though such warrants were specifically authorized by a state statute. 403 U.S. at 449-453. And in *Berger* v. *New York*, 388 U.S. 41 (1967) evidence obtained through electronic eavesdropping under the specific authority of a New York statute was suppressed because the statute violated the Fourth Amendment. In neither of these cases was the good faith of the officers relevant.[11] In sum,

11. The issue in this case is markedly different from that in *Michigan* v. *De Fillippo*, No. 77-1680, referred to by appellee (Br. at 85). In that case, the Michigan ordinance did not command a direct violation of the Fourth Amendment but arguably violated the Due Process Clause of the Fourteenth Amendment because it defined criminal behavior in an unconstitutional manner. If a "good faith" inquiry is at all relevant in that context, it is because otherwise a police officer might be required to determine whether statutes defining certain behavior as criminal were unconstitutional. That is a far cry from cases like this one where the statute in question violates the Fourth Amendment on its face. See, *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 877-878 (1975); *Almeida-Sanchez* v. *United States*, 413 U.S. at 272. Thus, if the police officers in *De Fillippo* had probable cause to arrest, it could still be argued that no Fourth Amendment violation had occurred. Here, that is impossible because New York's arrest statutes either violate the Fourth Amendment or they do not.

the result sought by appellee in *Payton* is squarely at odds with the Court's prior decisions and established principles of constitutional decision-making.

Besides being unfounded in sound constitutional doctrine, the four-pronged rule appellee proposes is simply unworkable. First, determining whether a given statute is ambiguous would be extremely difficult. Many statutes clear on their face may not be clear when they are applied to particular factual situations, and trial courts would have justified difficulty in deciding whether such statutes are "ambiguous" within the meaning of appellee's proposed rule.[12] Even more cumbersome is the proposal that the exclusionary rule should apply when the "statute was designed to evade Fourth Amendment requirements" (Br. at 89). Under the best of circumstances, "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment" [*Palmer* v. *Thompson*, 403 U.S. 217, 224 (1971)], and such a complex inquiry should not be thrust upon local trial courts attempting to hold suppression hearings in routine criminal cases.

The final branch of appellee's proposed rule is the least manageable of all. Appellee suggests that suppression should be denied only when no one in the law enforcement hierarchy "could have any reasonable doubt about the statute's validity" (Br. at 89), but what creates such a

12. For example, where a statute simply states that police may enter homes to arrest, without mentioning warrants, the statute is unambiguous on its face. But the silence of the statute with regard to warrants renders it less than clear on that score, and the legislature cannot certainly be said to have authorized warrantless entries. Thus the criterion of "lack of ambiguity" is itself fairly ambiguous.

"reasonable doubt" is not clear.[13] In the instant case, for example, Mr. Justice Harlan's statements in *Jones* v. *United States*, 357 U.S. 493, 499-500 (1957), cases such as *Accarino* v. *United States*, 179 F.2d 456 (D.C. Cir. 1949) and *Morrison* v. *United States*, 262 F.2d 449 (D.C. Cir. 1958), as well as this Court's creation of the "hot pursuit" exception in *Warden* v. *Hayden*, 387 U.S. 294 (1967), and the treatment of the issue as a substantial constitutional question in *Lankford* v. *Gelston*, 364 F.2d 197, 205-206 (4th Cir. 1966) should have caused doubt about the viability of the statute prior to the entry into Payton's apartment.[14] Indeed, the holdings of a single court, or even a persuasive law review article, might cause doubts about the validity of legislation. But the inquiry about when such a doubt arose, or should have arisen, is a morass into which courts should not be required to venture.

In conclusion, the momentous departure from sound principles of constitutional adjudication sought by appellee and the consequences which would ensue are simply not worth the price of denying Mr. Payton the relief which has

13. Here appellee abandons the premise adopted from *Peltier* that it is the officer's subjective good faith which is in question, and recognizes that there is a responsibility throughout the government for constitutional police behavior.

14. Appellee also implies that courts should rule on the merits of constitutional challenges to statutes, and apply the exclusionary rule, wherever the statute could be found unconstitutional by analogy with settled rules (Br. at 90). This conflicts with appellee's contention that the exclusionary rule should not apply in the *Payton* case, for in *Payton*, the argument that the warrant requirement should apply proceeds by direct analogy to firmly settled Fourth Amendment principles. Thus, if as appellee suggests, courts may apply the exclusionary rule in analogous cases, the exclusionary rule must apply here.

always been afforded litigants in the same posture. As even Professor Oaks has recognized,

> The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law.

Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 756 (1970).

Conclusion

For the reasons previously stated, the judgments in both *Payton* and *Riddick* should be reversed.

Respectfully submitted,

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